165-341

# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 865

WARREN E. PRICE, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED OCTOBER 31, 1941.

I, William A. Ketcham, the Attorney-General for the State of Indiana, do hereby certify that the matters and facts set forth in the above and foregoing petition are true.

WILLIAM A. KETCHAM.

STATE OF INDIANA, } SCT:
MARION COUNTY. }

Americus C. Daily, being first duly sworn on his oath, states that he is the Auditor of State of the State of Indiana, and, as such, charged with the duties appertaining to said office; that he is familiar with the facts set forth in the above and foregoing petition, and that the same are true in substance and in fact as therein averred and set forth, and further affiant saith not.

AMERICUS C. DAILY.

Subscribed and sworn to before me, the undersigned, a Notary Public within and for said county and State, this 19th day of November, 1896. Witness my hand and Notarial Seal.

HATTIE MOORE,
*Notary Public.*

{ SEAL }

The plaintiff in error in the above entitled cause of *The Western Union Telegraph Company* v. *The State of Indiana*, defendant in error, hereby accepts service of notice of the above and foregoing motion to advance said cause and set it for argument following the other causes set on the first Monday in December.

SAMUEL O. PICKENS,
*Attorney for Plaintiff in Error.*

November 19, 1896.

165-311

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1896.**

No. 625.

WARREN E. PRICE, PLAINTIFF IN ERROR,

*vs.*

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

**FILED OCTOBER 15, 1896.**

(16,404.)

(16,404.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1896.

No. 625.

WARREN E. PRICE, PLAINTIFF IN ERROR.

*vs.*

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 17, 1896.

a In the Supreme Court of the United States.

THE UNITED STATES, Plaintiff and Defendant in Error,
*vs.*
WARREN E. PRICE, Defendant and Plaintiff in Error.

*Certified Copy of Record on Writ of Error to the United States District Court in and for the Northern District of California.*

1 In the Supreme Court of the United States of America.

THE UNITED STATES OF AMERICA, Defendant in Error,
*vs.*
WARREN E. PRICE, Plaintiff in Error.
} Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the district court of the United States of America for the northern district of California, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said district court of the United States for the northern district of California, before the Honorable William W. Morrow, district judge, between The United States, plaintiff and defendant in error, and Warren E. Price, defendant and plaintiff in error, as by complaint doth appear, *and* we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together
2 with this writ, so that you have the same at Washington on the second Monday of October, A. D. one thousand eight hundred and ninety-six, in the said Supreme Court to be there and then held, that, the record and proceedings aforesaid be- then and there inspected, *in that* the said Supreme Court may cause further to be done therein to correct that error that of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 6th day of May, A. D. one thousand eight hundred and ninety-six.

[Seal of the U. S. District Court, Northern Dist. of California.]

SOUTHARD HOFFMAN,
*Clerk of the District Court of the United States for the Northern District of California.*

3 [Endorsed:] A. No. —, dept. —. In the Supreme Court of the United States. The United States, defendant in error,

plaintiff, *vs.* Warren E. Price, plaintiff in error, defendant. Writ of error. Service of the within by copy admitted this — day of ——, 189–. —— ——, attorney for —. Filed this 6 day of May, 1896. Southard Hoffman, clerk. Burnette G. Haskell, with Judge Robert Ferral, 331 Montgomery street, rooms 28, 29, San Francisco, Cal., attorney for defendant.

4 (*Return to Writ of Error.*)

The answer of the judge of the district court of the United States for the northern district of California.

The record and proceedings of the plaint whereof mention is within made, with all things touching the same, we certify, under the seal of our said court, to the Supreme Court of the United States, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[Seal of the U. S. District Court, Northern Dist. of California.]

SOUTHARD HOFFMAN,
*Clerk United States District Court,*
*Northern District of California.*

5 *Indictment.*

District Court of the United States for the Northern District of California.

At a stated term of the said court, begun and holden at the city and county of San Francisco, within and for the northern district of California, on the fourth Monday of November, in the year of our Lord one thousand eight hundred and ninety-five.

The grand jurors of the United States of America within and for the district aforesaid on their oath present that Warren E. Price, late of the northern district of California, heretofore, to wit, on the fourteenth day of October, in the year of our Lord one thousand eight hundred and ninety-five, at the city and county of San Francisco, State and northern district of California, and within the jurisdiction of the United States and of this honorable court, then and there being, did then and there wilfully, knowingly, unlawfully, and feloniously deposit and cause to be deposited in the mails of the United States at and in the said city and county of San Francisco, for mailing and delivery, a certain sealed envelope, upon which said sealed envelope there were then and there two postage stamps of the United States, each of the denomination of two cents, unused and uncancelled, and an address in writing as follows, to wit, "I. Schwartz, Crescent City, Calif.;" which said sealed envelope then and there contained a typewritten letter in words and figures as follows, to wit:

"The Paper Covered Book Store, 1203 Market St., San Francisco, California.

We keep the times behind us.

OCTOBER 14TH, '95.

DEAR SIR: I have no list which covers anything like all the so-called 'hot' books, but in case you wanted some I would guarantee not to put in anything which was not pretty good stock. There are not more than fifty such books now on the market, and the number is decreasing instead of the other thing. Nearly all retail at fifty cents, and the average discount is all of forty per cent.; on some it is 50 per cent. They would have to go to you by freight or express, as such books cannot be sent by mail. You could take as few or as many as you liked at a time, and in case you considered yourself stuck on anything sent would give credit on its being returned in good condition. Will mail you a couple of magazines which may interest you more or less. One of them will give you some information.

Yours, PAPER COVERED BOOK STORE,
1203 *Market.*"

And which said sealed envelope then and there also contained a circular concerning a book entitled "Scarlet Sin;" another circular concerning a book entitled "Tessie's Temptation;" another circular concerning Art Idols, an order blank of the Paper Covered Book Store, and a pamphlet entitled "The Best 1,000
6 Novels;" which said circulars, order, and pamphlet are too voluminous to be herein set forth, and which said typewritten letter herein set forth gave and gives information, directly and indirectly, where and how and of whom and by what means certain obscene, lewd, and la-civious books and pamphlets might and may be obtained, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

*Second Count.*

And the grand jurors aforesaid on their oath aforesaid do further present that Warren E. Price, late of the northern district of California, heretofore, to wit, on the thirty-first day of October, in the year of our Lord one thousand eight hundred and ninety-five, in the city and county of San Francisco, State and northern district of California, and within the jurisdiction of the United States and of this honorable court, then and there being, did then and there wilfully, knowingly, unlawfully, and feloniously deposit and cause to be deposited in the mails of the United States at and in the said city and county of San Francisco, for mailing and delivery, a certain sealed envelope, upon which said sealed envelope there were then and there a postage stamp of the United States of the denomination of two cents, unused and uncancelled, the printed words

"The Paper Covered Book Store, 1203 Market St., San Francisco, Calif., opposite the Ruins," and a written address as follows, to wit, "I. Schwartz, Crescent City, Calif.;" which said sealed envelope then and there contained a typewritten letter in words and figures as follows, to wit:

"The Paper Covered Bookstore, 1203 Market St., San Francisco, California.

We keep the times behind us.

OCTOBER 31ST, '95.

DEAR SIR: I have sent you 'Tessie's Temptation,' 'Decameron,' 'Scarlet Sin,' 'Voluptuous Duchess,' 'Sevent- Commandment,' and 'Gilded Vice.' All cost 25c. each except the last, and that is 15c., postage extra. In a day or two I will send the other book of which you wrote, and that will just even up the $2.00. Do not take less than a dollar for it. It is small, but comes high. If people will read such books, let them pay for them. They are worth about 30c. at wholesale, and not many to be had.

Yours, PAPER COVERED BOOK STORE,
1203 *Market*."

Which said typewritten letter gave and gives information, directly and indirectly, where and how and of whom and by what means certain obscene, lewd, and la-civious books and pamphlets might and may be obtained, contrary to the form of *of* the statute of the United States in such case made and provided and against the peace and dignity of the United States.

7 *Third Count.*

And the grand jurors aforesaid on their oath aforesaid do further present that Warren E. Price, late of the northern district of California, heretofore, to wit, on the seventh day of November, in the year of our Lord one thousand eight hundred and ninety-five, within the jurisdiction of the United States and of this honorable court, to wit, at the city and county of San Francisco, State and northern district of California, then and there being, did then and there wilfully, knowingly, unlawfully, and feloniously deposit and cause to be deposited in the mails of the United States at and in the said city and county of San Francisco, for mailing and delivery, a certain sealed envelope, upon which said sealed envelope there were then and there two postage stamps of the United States, each of the denomination of two cents, unused and uncancelled, and a typewritten address as follows, to wit, 'I. Schwartz, Crescent City, Calif.," which said sealed envelope then and there contained a printed book and pamphlet entitled "And Only a Boy," the character of which is and are so obscene, lewd, and la-civious that said book and pamphlet would be offensive if set forth in full in this indictment, and thus become a part of a permanent public record, contrary to the

form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

*Fourth Count.*

And the grand jurors aforesaid on their oath aforesaid do further present that Warren E. Price, late of the northern district of California, heretofore, to wit, on the twenty-seventh day of November, in the year of our Lord one thousand eight*een* hundred and ninety-five, within the jurisdiction of the United States and of this honorable court, to wit, at the city and county of San Francisco, State and northern district of California, then and there being, did then and there wilfully, knowingly, unlawfully, and feloniously deposit and cause to be deposited in the mails of the United States at and in the said city and county of San Francisco, for mailing and delivery, a certain sealed envelope, upon which said certain sealed envelope there *was* then and *and* there a postage stamp of the United States of the denomination of two cents, unused and uncanceled, the printed words "The Paper Covered Book Store, 1203 Market St., San Francisco, Calif.," and a written address as follows, to wit, "I. Schwartz, Crescent City, Cal.;" which said sealed envel*l*ope then and there contained a typewritten letter in words and figures as follows, to wit:

8 "The Paper Covered Book Store, 1203 Market St., San Francisco, California.

We keep the times behind us.

NOVEMBER 27TH, '95.

DEAR SIR: You must be thinking your five was taken in and done for. The fact is that I am not able to get hold of anything of the kind you ordered except two titles, and one of these is the same as I sent you before. I wanted to get all at one time and send by express, that being cheaper. If I can get nothing more, will send a couple of each that I have and you can tell me whether to return balance of money or send more of same. The Night in a Moorish Harem once was very common here and wholesaled at about four bits each, but now no one seems to have a copy to sell or to loan. You will hear from me in a day or two without fail.

Yours, PAPER COVERED BOOK STORE,
1203 *Market.*"

Which said letter gave and gives information, directly and indirectly, where and how and of whom and by what means certain obscene, lewd, and la-civious books and pamphlets might and may be obtained, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

*Fifth Count.*

And the grand jurors aforesaid on their oath aforesaid do further present that Warren E. Price, late of the northern district of California, heretofore, to wit, on the second day of December, in the year of our Lord one thousand eight hundred and ninety-five, within the *to wit* jurisdiction of the United States and of this honorable court, to wit, at the city and county of San Francisco, State and northern district of California, then and there being, did then and there wilfully, knowingly, unlawfully, and feloniously deposit and cause to be deposited in the mails of the United States at and in the said city and county of San Francisco, for mailing and delivery, a certain sealed envelope, upon which said sealed envelope there were then and there four postage stamps of the United States, each of the denomination of two cents, unused and uncanceled, and a typewritten address as follows, to wit, "I. Schwartz, Crescent City, Calif., news-dealer;" which said sealed envelope then and there contained four printed books and pamphlets, two of which said printed books and pamphlets were each entitled "And Only a Boy," and the other two of which said printed books and pamphlets were each entitled "A Bride's Composition to a Lady Friend," the character and contents of which said four printed books and pamphlets is and are so obscene, lewd, and lascivious that said books and pamphlets would be offensive if set forth in full in this indictment, and thus become parts of a permanent public record, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

HENRY S. FOOTE,
*United States Attorney.*

9 Names of witnesses examined before the said grand jury on finding the foregoing indictment: James W. Erwin, W. W. O'Neill.

(Endorsed:) A true bill. Abner Doble, foreman. Presented and filed in open court this 14th day of January, A. D. 1896. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

10 (Title of Court and Cause.)

*Demurrer.*

And the said Warren E. Price in his own proper person comes into court and, having heard the indictment read, says that the said indictment and the matters therein and the whole thereof are, as therein alleged and set forth, not sufficient in law to compel the said Warren E. Price to answer thereto:

For that neither counts number one, two, or four are publications or advertisements or notices wherein obscene, lewd, or lascivious matter may be had.

For that the said indictment and each and every count thereof is ambiguous, unintelligible, and uncertain.

For that the said indictment and each and every count thereof doth not state a public offence, and that neither nor any count thereof doth state a public offence.

And this the said Warren E. Price is ready to verify.

Wherefore he prays judgment and that by the court here he may *he may* be dismissed and discharged of the said indictment.

BURNETTE G. HASKELL,
*Attorney for said Defendant.*

(Endorsed:) Filed this 23rd day of January, 1896. Southard Hoffman, clerk.

11 (Title of Court and Cause.)

*Motion to Quash the Indictment.*

And now comes the said Warren E. Price, said defendant, and moves to quash the said indictment and each and every count thereof, for that the said indictment does not state a public offense.

And as well moves to quash, strike out, the first, second, and fourth counts of said indictment, for that neither nor any of the said counts states a public offence, and for that each and every of said counts is ambiguous, unintelligible, and uncertain, in this: that in none of said counts is there any designation whatever of any certain or particular book, pamphlet, or other matter as being lewd, lascivious, or obscene.

And as well moves to quash and strike out the words commencing on page two of said indictment, at line 5 thereof, at and including the words "and which," etc., and from thence to and inclusive of the words "set forth," on line eleven of the same page, for that the same is surplusage, is immaterial, and incompetent.

Wherefore he prays judgment and that he may be dismissed and discharged of said indictment and of such parts and portions thereof as the said honorable court may decree are of no avail, and he be not bound to answer.

BURNETTE G. HASKELL,
*Attorney for said Defendant.*

(Endorsed:) Filed this 23rd day of January, 1896. Southard Hoffman, clerk.

12 At a stated term of the district court of the United States of America for the northern district of California, held at the court-room, in the city of San Francisco, on Wednesday, the first day of April, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable Wm. W. Morrow, judge.

THE UNITED STATES
*vs.*
WARREN E. PRICE.

In this case, the defendant being present in open court with B. G. Haskell, Esq., his attorney, on motion of Bert Schlesenger, Esq., assistant United States attorney, the motion to quash the indictment came on for hearing and was argued by Mr. Haskell, Esq., in support thereof and by Mr. Schlesenger in opposition thereto, and submitted to the court for consideration and decision, and, after due consideration had thereon, it is by the court ordered that said motion to quash be, and the same hereby is, sustained as to the first, second, and fourth counts of the indictment, and further ordered that the first, second, and fourth counts of the indictment be, and the same are hereby, quashed.

The demurrer to the indictment thereupon came on for hearing and was duly argued by Mr. Haskell in support thereof, and by Mr. Schlesinger in opposition thereto, and submitted to the court for consideration and decision, and, after due consideration had thereon, it is by the court ordered that said demurrer be, and the same is hereby, overruled, and to which order overruling the demurrer the defendant, by his attorney, then and there duly excepted.

On motion of Mr. Schlesenger and by order of the court the defendant was duly arraigned upon the indictment on file herein against him, and to which indictment he then and there pleaded not guilty.

13 In the District Court of the United States in and for the Northern District of California.

Before the Honorable W. W. Morrow, district judge.

THE UNITED STATES
*vs.*
WARREN E. PRICE. } In Arrest of Judgment.

Now comes the above-named defendant in the above-entitled cause and moves the honorable court herein that the judgment in the said cause may be arrested and set aside and the said defendant be discharged herein and go free, on the following grounds, to wit:

That the third and fifth counts of the indictment herein do not state a public offense under the laws of the United States.

That this honorable court, that hath tried, convicted, and is about to sentence said defendant under said counts, hath and had no jurisdiction in the premises.

That said third and fifth counts of said indictment do not nor do neither of them, with any certainty, accuracy, precision, directness, nor sufficiency, state the facts or elements necessary to constitute an offense under the laws of the United States; that the same and each of them is ambiguous, inintelligible, and uncertain and a mere expression of opinion, in this: that it is nowhere in either of said

counts alleged that the said books or pamphlets or either of
14 them were in fact obscene, lewd, or la-civious or of an indecent character or were non-mailable matter.

Wherefore defendant prays dismissal and discharge of said indictment.

Very respectfully, BURNETTE G. HASKELL,
*Attorney for said Defendant.*

San Francisco, April 7, 1896.

(Endorsed:) Filed April 7th, 1896. Southard Hoffman, clerk, by J. S. Manley, deputy clerk.

15 In the District Court of the United States in and for the Northern District of California.

THE UNITED STATES OF AMERICA
*vs.*
WARREN E. PRICE.

And now, on this fourteenth day of April, 1896, in open court, and before the passing of sentence herein, comes the said defendant, *and* the district attorney of the United States for said northern district being then and there present, and said defendant then and there moves for a new trial of said cause upon the following grounds, to wit:

1. That the court erred in overruling defendant's demurrer to the indictment herein.
2. That the court erred in refusing to quash the whole of said indictment.
3. That the court erred in admitting and rejecting evidence on the trial of said cause, and in the decisions of questions of law arising during the trial.
4. That the court erred in denying defendant's motion for an arrest of judgment herein.

Respectfully submitted.

BURNETTE G. HASKELL,
*Attorney for said Def't.*

(Endorsed:) Filed this 14th day of April, 1896. Southard Hoffman, clerk.

16 In the District Court of the United States in and for the Northern District of California.

Before the Hon. W. W. Morrow, district judge.

THE UNITED STATES
*vs.*
WARREN E. PRICE. } Bill of Exceptions.

Be it remembered that this cause came on regularly for trial at a regular term of said court on the first day of April, A. D. 1896, the

Hon. W. W. Morrow, district judge for the northern district of California, presiding, and assistant United States district attorney Bert Schlesenger appearing for the United States and Burnette G. Haskell, Esq., appearing for the defendant.

A jury was regularly impannelled, and the district attorney made his opening statement to the jury.

JAMES W. IRWIN was called and sworn on behalf of the prosecution and testified as follows:

"I am United States post-office inspector, with headquarters at San Francisco; have been such for eight years. In October,
17 1895, my attention was called to the fact that Mr. Price was engaged in using the mails in the dissemination of obscene literature. Upon that information I acted. I addressed a communication on October the 8th, 1895, as follows:

I. Schwartz, news-dealer, Crescent City, Cal.

Addressed to W. E. Price, 1203 Market St., San Francisco.

Date, OCTOBER 8, 1895.

DEAR SIR: I have recently opened up business in this place and think from inquiries already made by millmen and lumbermen that I can sell a good many books of a spicy character. When in San Francisco a year ago I bought some very good French novels of you. Please send me a list of a few good sellers in this line, such as you think would take among a reather rough class of men. Let me know what your lowest price is for cash with order. I shall have to feel my way a little slow at first, but I think I can work into a good trade if I can satisfy my customers.

Yours, I. SCHWARTZ.

I assumed the name of I. Schwartz for my correspondence with defendant. (Witness here produced a copy of the letter above.) It was deposited in the mails by me and addressed to the defendant. It is an exact copy of the original mailed, as I compared it at the time of sending it."

To the introduction of this letter counsel for defendant objected, on the ground that it was incompetent, irrelevant, and immaterial, and upon the further ground that no proper foundation had been laid, and that the same was a decoy letter, inciting and provoking the commission of a crime on behalf of the Government. The objection was overruled and the letter was admitted in evidence; to which ruling the defendant then and there excepted.

(The witness continued:)

"I gave instructions to Mr. T. J. Ford, superintendent of
18 the mails at the San Francisco post-office, to hold out any letters addressed to I. Schwartz, Crescent City, California. On October 14, 1895, I received from the San Francisco post-office,

enclosed in an envelope, stamped and postmarked, and addressed I. Schwartz, Crescent City, California, the following communication:

(Heading:) Paper-covered Bookstore, 1203 Market St., San Francisco.

OCTOBER 14, 1895.

I. Schwartz, Crescent City.

DEAR SIR: I have no list which covers anything like all the so-called "hot" books, but in case you wanted some I could guarantee not to put in anything which was not pretty good stock. There are not more than fifty such books on the market, and the number is decreasing instead of the other thing. Nearly all retail at fifty cents, and there is an average discount of forty per cent.

They would have to go to you by freight or express, as such books cannot go through the mails. You could take as few or as many as you wish at a time, and in case that you considered that you had been stuck in any sense, would give you credit on its being returned in good condition.

Will mail you sample copies of magazines which may interest you more or less. One of them will give you some information.

Yours respectfully,

PAPER COVERED BOOKSTORE.

(This letter was objected to by defendant on the same grounds as the previous letter. Objection overruled. Letter admitted in evidence. Defendant thereupon duly excepted.)

(The witness continued:)

"I received from the post-office sample copies of magazines. They were addressed, I Schwartz, Crescent City, California.

On October 24, 1895, I addressed a letter as follows:

(Heading:) I. Schwartz, Crescent City, Cal.

OCT. 24, 1895.

The Paper-covered Bookstore, San Francisco, Cal.:

19 Enclosed please find two dollars, for which send me sample copies of "Scarlet Sin," "Golded Vice," and "Tessie's Temptation;" also such other books of that character as the balance will procure.

One of my customers desires to procure a copy of "She." From what he tells me of it, I judge it would be hard to get. If you can refer me to where I can get such publications of that order, I shall be much obliged, as I can sell lots of them to the lumber and mill men in this vicinity.

Yours, I. SCHWARTZ.

Send by express.

This letter purported to have been duly registered at Crescent City, and the envelope was duly stamped and addressed to the

Paper Covered Bookstore, 1203 Market St., San Francisco, Cal. The letter was delivered at said place to W. E. Price, the defendant, and receipted for by him on a registry return receipt which was admitted in evidence. To the introduction of this letter and the receipt counsel for defendant objected on the grounds as stated above. The objection was overruled, the letter and receipt admitted, and defendant then and there excepted.

(Witness continued:)

"I have not the original of the letter. It was sent to the defendant. The copy was made at the time and is a copy of the original.

On October 31 I received the following communication through the Post-office Department, enclosed in an envelope and duly addressed and stamped as the other letters:

20 OCT. 31, 1895.

I. Schwartz, Crescent City, California.

DEAR SIR: I have sent you "Decameron," "Voluptuous Duchess," "Seventh Commandment," and "Gilded Vice." All cost 25c. each except the last, and that is 15c., postage extra. In a day or two I will send you the other book of which you wrote, and that will just even up the $2.00.

Do not take less than a dollar for it. It is small, but comes high. If people will read such books, let them pay for them.

They are worth about 30c. wholesale, and not many to be had.

Yours, PAPER COVERED BOOKSTORE,
1203 *Market.*

This letter was offered in evidence, and objected to by defendant on grounds above stated. The objection was overruled, the letter admitted, and defendant excepted.

On the 7th day of November I received, through the San Francisco post-office establishment, enclosed in an envelope addressed in typewriter "I. Schwartz, Crescent City, Calif.," and duly stamped, a book entitled "And Only a Boy," which book, with identical text, is also published under the title of "She." The envelope shows that it was regularly transmitted through the mails.

The book is here admitted by counsel for defendant to be obscene, lewd, and lascivious and within the scope of the statute; but counsel for defendant objected to its introduction in evidence, on the ground that it was incompetent and irrelevant and not shown to have been mailed by defendant. The court overruled the objection and the book was admitted in evidence; to which ruling defendant then and there excepted.

21 On November 11 I sent a letter of which the following is a copy:

(Heading: Schwartz, Crescent City, etc.)

(Addressed to Paper Covered Bookstore, etc.,)

Dated: Nov. 11, 1895.

DEAR SIR: The books you sent in compliance with my order were duly received, the little one yesterday. It is just what a lot of my customers want. Now, if you can send me some more of this kind of books, I can get big prices for them. I enclose five dollars, for which send me as big an assortment as you can. One of my customers says there is a book called A Night in a Turkish Harem, which is very hot stuff. Can you get it for me? There is another called Passionate Love, or something like that, which I should like. Tell me what the prices of these different books are—that is, the prices you can let me have them for—and I will send you a good big order for them. Send as soon as possible, as one of my best customers is going away soon.

Yours, I. SCHWARTZ.

It is admitted that this letter was registered, contained five dollars, and that letter and money were received by the defendant on November 15, 1895.

To the introduction of this letter defendant made the same objection that was made to the first letter. The objection was overruled, the letter admitted, and defendant excepted.

(The witness continued:)

"On November 28, 1895, I received, through the post-office establishment at San Francisco, the following letter, enclosed in an envelope, duly stamped and addressed I. Schwartz, Crescent City, Cal., as follows:

22 Nov. 27, 1895.

DEAR SIR: You must be thinking your five was taken in and done for. The fact is that I am not able to get hold of anything of the kind you ordered except two titles, and one of those is the same as I sent you before. I wanted to get all at one time and send by express, as that is cheaper. If I can get nothing more, will send a couple of each that I have, and then you can tell me whether to return balance of money or send more of same. The Night in a Moorish Harem once was very common here and wholesaled at about four bits, but now no one seems to have a copy to sell or loan. You will hear from me in a day or two without fail.

Yours, PAPER COVERED BOOKSTORE,
1203 *Market.*

This letter was admitted in evidence against the defendant's objection and exception, as above stated.

On December 2, 1895, I received through the San Francisco post-office establishment an envelope addressed I. Schwartz, Crescent City, Calif., news-dealer, duly stamped and postmarked, containing

three books, one entitled "And Only a Boy," and the others "A Bride's Composition to a Lady Friend."

Which said books were admitted by counsel for the defendant to be obscene, lewd, and lascivious and within the scope of the statute. They were offered in evidence by the Government, counsel for defendant objecting to their admission on the ground that the same were irrelevant and immaterial and not shown to have been mailed by defendant. The objection was overruled, the books admitted, and defendant excepted.

On cross-examination witness testified as follows:

On or about the date it bears, I received through the mails the following registered letter, enclosing within it a five-dollar gold piece:

23 (Heading: Paper Covered Bookstore, etc.)

(Address: I. Schwartz, etc.)

(Dated: DECEMBER 11, 1895.)

DEAR SIR: We return the five dollars you sent, for the double reason that you have asked us to and that we are unable to secure the books you wish, though we have tried every place we could think of. Would have sent it a little sooner but have been trying to get hold of paper money and could not.

Yours, PAPER COVERED BOOK STORE.

The witness Irwin, on cross-examination, also stated that he knew one Frank Kane, the secretary for the Society for the Suppression of Vice; that he had talked with Kane about the defendant's case before his arrest, but that he had not told him of the decoy letters nor the means taken to — evidence against the accused.

JAMES W. MCGEARY testified for the prosecution as follows:

"I am chief clerk of the postal inspectors of the Pacific division. I have examined the records of the Post-office Department at San Francisco relative to newspaper declarations. A declaration was filed in the name of W. E. Price, as proprietor of the Paper Covered Bookstore, in 1894. He described himself distinctly as proprietor, and that there has been no change."

JOHN O'NEILL testified for the prosecution as follows:

"I have been a letter-carrier in San Francisco about six years. The store at 1203 Market street is within my route and has
24 been for that length of time. I have always delivered letters addressed to Paper Covered Bookstore, when registered, to W. E. Price. He would generally receipt for them and sign for such letters as proprietor. Always held himself out to me as the proprietor of the store and was considered as such."

It was admitted that defendant W. E. Price sent the letters addressed to Schwartz, and that he was the manager of the Paper Covered Bookstore during all the time mentioned in the testimony, but he denied having sent the books introduced by the prosecution.

These books, entitled "And Only a Boy," and "A Bride's Composition to a Lady Friend," were admittedly obscene and were addressed in typewriter. There was no direct proof, outside of the letters of defendant, of the defendant having mailed the obscene books, save and except what might have been inferred by a comparison of the typewriting in defendant's letters with the typewritten address on the envelopes containing the books, it being contended by the Government that the addresses showed the same peculiarities of typewriting as shown in Price's admitted letters.

In defense, the defendant testified that he sent one book only, and that was a copy of a book called "She;" that it was what was known in the trade as a "fake" copy, being not so obscene as to be non-mailable. Defendant also introduced in evidence copies of
25 "fake" books entitled "And Only a Boy," "A Bride's Composition," and other titles, all enclosed in wrappers and marked "price, $2.00."

Defendant denied having sent or procured to be sent any one of the obscene books produced by the Government.

Defendant offered to prove that Frank Kane has an animus and hatred toward defendant and had threatened to have the machinery of the United States court used against him, and offered to prove that defendant was the object of a religious persecution at the hands of Kane, from which he would seek to have the jury draw the inference that Kane or some of his agents had sent the books in question.

But on a further examination of Irwin, he testifying that he communicated his correspondence to no one, the court disallowed the evidence on this point; to which the defendant then and there excepted.

The jury afterwards returned a verdict of guilty as charged on both counts of the indictment.

Defendant thereafter made a motion in arrest of judgment, which was denied by the court; to which decision defendant then and there duly excepted.

Whereupon the court fixed upon Tuesday, April 14th, 1896, as the day for sentence, when the defendant moved the court for a new trial upon the following grounds:

1. That the verdict is contrary to law.

2. That the court misdirected the jury in matters of law,
26 and that the court erred in the decision of questions of law arising during the course of the trial.

The motion for a new trial was thereupon denied; to which ruling the defendant then and there duly excepted.

Subsequently and thereupon the court sentenced the defendant to eighteen months imprisonment in the California States prison at San Quentin, and to pay a fine of five hundred dollars.

Subsequently, and within the statutory time, defendant prepared and settled his bill of exceptions and made application for a writ of error to the Supreme Court of the United States.

And herewith defendant offers and files at the same time assign-

ment and specification of errors on which he will rely on said writ of error to said Supreme Court.

Respectfully submitted.

BURNETTE G. HASKELL,
*Attorney for said Defendant.*

The foregoing bill of exceptions settled and allowed this 6th day of May, A. D. 1896.

WM. W. MORROW,
*United States District Judge in and for the Northern District of California.*

(Endorsed:) Filed this 6th day of May, 1896. Southard Hoffman, clerk.

27 In the District Court of the United States in and for the Northern District of California.

THE UNITED STATES, Plaintiff,
*vs.*
WARREN E. PRICE, Defendant.
} Petition for an Order Allowing a Writ of Error.

The said Warren E. Price, feeling himself aggrieved by the verdict of the jury and the judgment entered by the court on the fourteenth day of April, A. D. 1896, in pursuance of such verdict, whereby it was ordered, adjudged, and decreed that the defendant be imprisoned in the State prison at San Quentin for the period of eighteen months and to pay a fine of five hundred dollars—

Comes now, by Burnette G. Haskell, Esq., his attorney, and respectfully petitions this honorable court for an order allowing this defendant to prosecute a writ of error to the honorable the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided, and that on the allowance of said writ of error all further proceedings in this court be suspended and stayed *under* the determination of said writ of error by the United States Supreme Court.

Said defendant herewith files his bill of exceptions herein, together with his specifications and assignments of error; to which bill of exceptions and specifications and assignments of error reference
28 is hereby specially made for the purpose of this application.

Reference is also made to the entire record of the case at the date of this application on file herein.

Respectfully submitted.

BURNETTE G. HASKELL,
*Attorney for said Defendant.*

(Endorsed:) Filed this 6th day of May, 1896. Southard Hoffman, clerk.

29 In the District Court of the United States in and for the Northern District of California.

THE UNITED STATES OF AMERICA
*vs.*
WARREN E. PRICE.

Now comes the above-named defendant and particularly specifies the following as errors upon which he will rely and which he will urge upon his writ of error in the above-entitled cause:

1. That the court erred in overruling defendant's demurrer to the indictment herein.
2. That the court erred in refusing to quash the whole of the indictment herein.
3. That the court erred in admitting the evidence of witness Irwin as to the decoy letters.
4. That the court erred in refusing to permit the defense to go into the matter of Frank Kane's animus and interest.
5. That the court erred in denying defendant's motion for an arrest of judgment herein.
6. That the court erred in denying defendant's motion for a new trial.

30 In order that the foregoing assignments of error may be and appear of record, the plaintiff in error presents the same to the court and prays that such disposition may be made thereof as in accordance with law and the statutes of the United States in such case made and provided, and prays an order that the judgment of the United States district court in and for the northern district of California be reversed and set aside, and that he be granted a new trial, and that he be dismissed and discharged from said indictment in said cause.

BURNETTE G. HASKELL,
*Attorney for said Defendant.*

San Francisco, April 16, 1896.

(Endorsed:) Filed this 6th day of May, 1896. Southard Hoffman, clerk.

31 In the District Court of the United States in and for the Northern District of California.

THE UNITED STATES, Plaintiff,
*vs.*
WARREN E. PRICE, Defendant.

Order Allowing Writ of Error and Directing Clerk to Issue the Same.

Upon reading and filing the petition of Warren E. Price, said defendant, from the judgment entered by this court on April 14, 1896, whereby it was decreed that defendant be imprisoned in the State prison at San Quentin for the period of eighteen months and pay a fine of five hundred dollars, that he be allowed to prosecute a writ of error to the honorable the Supreme Court of the United

States under and according to the laws of the United States in that behalf made and provided, and good cause appearing for the granting of said petition—

It is hereby ordered that said defendant be permitted to so prosecute said writ of error to said Supreme Court of the United States; and, further, that the clerk of this court do forthwith issue said writ in said behalf.

WM. W. MORROW,
*District Judge of the United States District Court in and for the Northern District of California.*

(Endorsed:) Filed May 6th, 1896. Southard Hoffman, clerk.

32 In the Supreme Court of the United States of America.

THE UNITED STATES OF AMERICA, Defendant in Error,
*vs.*
WARREN E. PRICE, Plaintiff in Error.
} Citation on Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

To H. S. Foote, Esq., attorney for the United States and United States district attorney for the northern district of California:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. one thousand eight hundred and ninety-six, pursuant to an order allowing a writ of error, entered in the clerk's office of the district court of the United States for the northern district of California, from a judgment of conviction, entered on the fourteenth day of April, A. D. 1896, in that certain action wherein The United States was plaintiff and Warren E. Price was defendant, and show cause, if any there be, why the judgment of conviction rendered against said defendant, Warren E. Price, as in said order allowing writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice
33 of the Supreme Court of the United States of America, this 6th day of May, A. D. 1896.

WM. W. MORROW,
*Judge of the District Court of the United States for the Northern District of California.*

Service of the within citation is hereby admitted this 6th day of May, A. D. 1896.

H. S. FOOTE,
*United States District Attorney for the Northern District of California.*

34 [Endorsed:] No. —, dep't —. In the Supreme Court of the United States. The United States, defendant in error, plaintiff, *vs.* Warren E. Price, plaintiff in error, defendant. Citation on writ of error. Service of the within by copy admitted this — day of ——, 189–. —— ——, attorney for ——. Filed this 6 day of May, 1896. Southard Hoffman, clerk. Burnette G. Haskell, with Judge Robert Ferral, 331 Montgomery street, rooms 28, 29, San Francisco, Cal., attorney for ——.

35 UNITED STATES OF AMERICA, *Northern District of California*, } *ss*:

I, Southard Hoffman, clerk of the district court of the United States for the northern district of California, do hereby certify the foregoing and hereunto annexed thirty-four pages, numbered from one (1) to thirty-four (34) respectively, are a true copy of the record and of all proceedings in the cause mentioned in the annexed writ of error, and that the same constitute the return to said writ.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at San Francisco, in said district, this 6th day of April, 1896.

Seal of the U. S. District Court, Northern Dist. of California.

SOUTHARD HOFFMAN,
*Clerk U. S. District Court, Northern District of Cal'a.*

Endorsed on cover: Case No. 16,404. N. California D. C. U. S. Term No., 625. Warren E. Price, plaintiff in error, *vs.* The United States. Filed October 15, 1896.

165-311

Office Supreme Court, U. S.
FILED.
OCT 19 1896
JAMES H. McKENNEY,
CLERK.

165-311

# In the Supreme Court of the United States.

OCTOBER TERM, 1896.

WARREN E. PRICE, PLAINTIFF in error,
v.
THE UNITED STATES.
No. 625.

## MOTION TO ADVANCE.

# In the Supreme Court of the United States.

OCTOBER TERM, 1896.

WARREN E. PRICE, PLAINTIFF in error,
*v.*
THE UNITED STATES.

No. 625.

## MOTION TO ADVANCE.

The plaintiff in error was indicted in the district court of the United States for the northern district of California on November 4, 1895, for sending obscene books through the mails. He was tried, convicted, and sentenced to imprisonment in the California State prison for eighteen months and to pay a fine of $500. He was admitted to bail in the sum of $5,000 on June 18 last, and since that time has been at large.

The Solicitor-General respectfully moves the court to advance the case on the docket, and set it down for early hearing during the present term.

Notice of this motion has been served on the plaintiff in error.

HOLMES CONRAD,
*Solicitor-General.*

5665

165-311

No. 625.

Office Supreme Court, U. S.
FILED.
JAN 11 1897
JAMES H. McKENNEY,
CLERK.

IN THE

# SUPREME COURT

OF THE

## UNITED STATES

OF AMERICA.

THE UNITED STATES OF AMERICA,
COMPLAINANT AND DEFENDANT IN ERROR,

*vs.*

WARREN E. PRICE,
DEFENDANT AND PLAINTIFF IN ERROR.

## BRIEF FOR PLAINTIFF IN ERROR.

*Filed this..... day of ..... .....1897.*

..... *Clerk.*

WARREN E. PRICE,
1203 Market St., San Francisco.
Appearing in *Propria Persona.*

BURNETTE G. HASKELL, ESQ.,
331 Montgomery St., S. F.
*of Counsel by Courtesy.*

REMBAUGH, PRINTER, 7 MANNING PLACE, S. F.

IN THE

# SUPREME COURT

OF THE

## UNITED STATES

OF AMERICA.

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THE UNITED STATES OF AMERICA,
PLAINTIFF, AND DEFENDANT IN ERROR,

*vs.*

WARREN E. PRICE,
DEFENDANT, AND PLAINTIFF IN ERROR.

No. 627.

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On writ of Error to the United States District Court for the Northern District of California, from a conviction of defendent for depositing non-mailable matter, obscene literature, in the United States mails, under section Three thousand eight hundred and ninety-three, (3893), as amended September twenty-sixth, 1888.

# BRIEF FOR SAID PLAINTIFF IN ERROR.

Said WARREN E. PRICE appearing in Propria Persona:

## STATEMENT OF THE CASE.

On or about the 14th day of January, 1896, as shown by the annexed and attached copies of the pleadings in this said cause, the defendant, Warren E. Price, was indicted by the Grand Jury within and for the Northern District of California under section 3893 of the Revised Statutes of the United States, as amended September 26, 1888, upon an Indictment framed in five distinct counts, alleging five separate offenses,—three for giving information where obscene matter might be obtained, and two others claiming to charge the actual sending of obscene matter.

The main contention of the Plaintiff in Error is that no part of the Indictment nor any count thereof states in any degree whatever a public offense under the statute; that this contention was in part sustained by the trial Judge, will appear later; that such contention should have been so sustained as to each and every count and *especially* as to those on which defendent was convicted, we think will be obvious to the Appellate Court upon merely the briefest examination of the counts of the Indictment involved.

That Petitioner and Plaintiff in Error herein, in addition, however, to the points raised hereafter as to the sufficiency of the indictment on the trial of the cause, objected to the introduction of the letters produced in evidence upon the broad ground of their competency, claiming that the same were decoy letters and should

thus, together with the replies they provoked, have been excluded, since they *incited* and *provoked* the commission of the crime alleged.

The Government of the United States, nor any of its agents, should be permitted to act as an *Agent Provocateur.*

First, referring, however, to the matter of the sufficiency of the Indictment, it may be said that the First, Second and Fourth Counts of said Indictment were the ones that purported to charge defendant with having deposited in the United States mails three letters, each giving information where and how obscene, lewd and lascivious books of an indecent character could be obtained. That petitioner demurred to said counts, and as well, moved to quash them on the main ground that they were so framed as not to state a public offense. That said motion to quash said three counts was granted by the Court and the said counts were stricken out of said indictment.

That the other two counts of said Indictment, to wit the counts numbered therein, the "Third" and the "Fifth," *purported* and *pretended* to charge that on two occasions the petitioner had knowingly deposited in the mails of the United States certain non-mailable matter, to wit: certain lewd, obscene and lascivious books of an indecent character, mailed on a certain day, addressed to a certain address, bearing uncancelled and unused stamps of the United States and entitled, "And Only a Boy," and "A Bride's Composition to a Lady Friend," the contents of which said books were so obscene that they would be offensive if set out in the indictment and thus become part of a permanent public record. That Petitioner demurred to said counts and as well also moved to quash and strike them out, on the grounds that they did not, nor did

either of them, as framed, state a public offense under the laws of the United States. That the said counts and each of them, were so framed that they did *not* state the ultimate nor material facts required to be set out by the statute, and the simplest rules of criminal pleading.

The said counts did not state, nor did either of them, that the said matter so deposited as alleged was either non-mailable matter, nor that it was obscene, nor that it was lewd, nor that it was lascivious, nor that it was of an indecent character. That said Indictment nowhere made any such *direct* statement whatever of the ultimate fact of the actual or unlawful obscenity of such matter as required by the statute, but as a matter of fact stated only a conclusion, intendment and opinion of the pleader on a matter of the grade of the obscenity, and that such grade as so stated has never been and is not made a statutory offense. The Indictment stated said charges only in these words:

"Which said book and pamphlet is *so* obscene, lewd and lascivious *that* said book and pamphlet *would be offensive* IF set forth in full in this indictment, and thus become part of a permanent public record, contrary to the form, etc., "

That the Court overruled said demurrer and refused to quash said counts last aforesaid. That defendant pleaded "Not Guilty," and went to immediate trial. That on the trial of said cause defendant, your Petitioner, took the stand in his own behalf and denied on oath that he had sent the books produced and offered in evidence under said Indictment, and that he had ever before handled or seen them.

That thereafter the jury found the defendant guilty. That thereafter defendant moved in arrest of judgment and for a new trial on the grounds as stated aforesaid and others, both of which said motions were denied by

the Court. That to all these denials of defendant's said motions, defendant duly and regularly excepted. That thereafter defendant was sentenced by the Court to eighteen months' imprisonment in the State's Prison and to pay a fine of five hundred dollars.

The pleadings to which we desire to call the special attention of the Appellate Court follow, summarized, and though condensed, preserve their original verbiage, and are:—

1. The Indictment.
2. The Motion to Quash the Indictment.
3. The Demurrer to the Indictment.
4. The Motion in Arrest of Judgment.
5. The Bill of Exceptions as Settled.
6. The Motion for a New Trial.

References to each of the said pleadings, as may be made in this brief, will be made as per the number and pages as herein set out.

## INDICTMENT.

At a stated term the Grand Jurors on their oath present:

### First Count.

That Warren E. Price,
late of the Northern District of California, heretofore, to wit: on the fourteenth day of October, in the year of our Lord, one thousand eight hundred and ninety-five, at the City and County of San Francisco, State and Northern District of California and within the jurisdiction of the United States and of this Honorable Court, then and there being, did then and there wilfully, knowingly, unlawfully and feloniously deposit and caused to be deposited in the mails of the United States, and in the said City and County of San Francisco, for mailing and delivery, a certain sealed envelope, upon which said sealed envelope there were there two postage stamps of the United States, each of the denomination of two cents, unused and uncancelled, and an address in

writing as follows, to wit: "I. Schwartz, Crescent City, Calif.," which said sealed envelope then and there contained a type-written letter in words and figures as follaws, to wit:

(Letter here follows but as this count was quashed it is not deemed necessary to here insert it.)

And which said sealed envelope then and there also contained a circular concerning a book entitled "Scarlet Sin," another circular concerning a book entitled "Tessie's Temptation," another circular concerning Art Idols and an Order Blank of the Paper Covered Book Store, and a Pamphlet entitled "The Best 1,000 Novels," which said circulars, order and pamphlet are two voluminous to be herein set forth, and which said type-written letter herein set forth gave and gives information directly and indirectly, where and how and of whom and by what means certain obscene, lewd, and lascivious books and pamphlets might and may be obtained, contrary to the form of the statute of the United States in such case made and provided, and against the peace and the dignity of the United States.

SECOND COUNT.

And the Grand Jurors do further present: That Warren E. Price,

did then and there, wilfully, knowingly, unlawfully and feloniously deposit and cause to be deposited in the mails of the United States at and in the said City and County of San Francisco, for mailing and delivery, a certain sealed envelope, upon which said sealed envelope there were then and there a postage stamp of the United States of the denomination of two cents, unused and uncancelled, the printed words: "The Paper Covered Book Store, 1203 Market St., San Francisco, Calif., opposite the Ruins," and a written address as follows, to wit: "I. Schwartz, Crescent City, Calif.," which said sealed envelope then and there contained a type-written letter in words and figures as follows, to wit:

(Letter omitted for the reasons given in the first count). Which said type-written letter gave and gives information directly and indirectly where and how and of whom and by what means certain obscene, lewd and lascivious books and pamphlets might and may be obtained, contrary to the form of the statute of the United States in such case made and provided and against the peace and dignity of the United States.

THIRD COUNT.

And the Grand Jurors aforesaid on their oath aforesaid do further present: That

Warren E. Price,

late of the Northern District of California, heretofore, to wit: on the seventh day of November, in the year of our Lord, one thousand eight hundred and ninety-five, within the jurisdiction of the United States and of this Honorable Court, to wit: at the City and County of San Francisco, State and Northern District of California, then and there being, did then and there wilfully, knowingly, unlawfully and feloniously deposit and cause to be deposited in the mails of the United States, at and in the City and County of San Francisco, for mailing and delivery, a certain sealed envelope upon which said sealed envelope there were then and there two postage stamps of the United States, each of the denomination of two cents, unused and uncancelled, and a type-written address as follows, to wit: "I. Schwartz, Crescent City, Calif.," which said sealed envelope then and there contained a printed book and pamphlet entitled "And Only a Boy," *the character of which is* SO *obscene, lewd and lascivious that said book and pamphlet* WOULD BE *offensive* IF *set forth in full in this indictment* and thus become part of a permanent public record, contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

FOURTH COUNT.

And the Grand Jurors do further present: That

Warren E. Price,

did then and there wilfully, knowingly, unlawfully and feloniously deposit and cause to be deposited in the mails of the United States at and in the said City and County of San Francisco, for mailing and delivery, a certain sealed envelope, upon which said certain sealed envelope there was then and there a postage stamp of the United States of the denomination of two cents unused and uncancelled, the printed words: "The Paper Covered Book Store, 1203 Market St., San Francisco, California," and a written address as follows, to wit: "I. Schwartz,Crescent City,Cal.,"which said sealed envelope then and there contained a type-written letter in words and figures as follows, to wit:

(This letter omitted for the same reason as that given in first count.)
Which said letter gave and gives information, directly and indirectly, where and how and of whom and by what means certain obscene, lewd and lascivious books and pamphlets might and may be obtained, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

FIFTH COUNT.

And the Grand Jurors aforesaid on their oath aforesaid do further present: That
Warren E. Price,
late of the Northern District of California, heretofore, to wit: on the second day of December, in the year of our Lord, one thousand eight hundred and ninety-five, within the jurisdiction of the United States and of this Honorable Court, to wit: at the City and County of San Francisco, State and Northern District of California, then and there being, did then and there wilfully, knowingly, unlawfully and feloniously deposit and cause to be deposited in the mails of the United States, at and in the said City and County of San Francisco, for mailing and delivery, a certain sealed envelope, upon which said sealed envelope there were then and there four postage stamps of the United States, each of the denomination of two cents, unused and uncancled, and a type-written address as follows, to wit:"I. Schwartz,Crescent City,Calif., News-Dealer," which said sealed envelope then and there contained four printed books and pamphlets two of which said printed books and pamphlets were each entitled "And Only a Boy," and the other two of said printed books and pamphlets were each entitled "A Bride's Composition to a Lady Friend," *the character of which said four printed books and pamphlets is so obscene, lewd and lascivious, that said books and pamphlets* WOULD BE *offensive* IF *set forth in full in this indictment* and thus become part of a permanent public record, contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the United States.

HENRY S. FOOTE,
*United States Attorney.*

To this indictment, before plea of any kind, defendant interposed the following:

## MOTION TO QUASH THE INDICTMENT.

And now comes the said Warren E. Price, said Defendant, and moves to quash the said Indictment, and each and every count thereof, for that the said indictment does not state a public offense.

And as well, moves to strike out the first, second and fourth counts of said Indictment, for that neither nor any of the said counts states a public offense; and for that each and everyone of said counts is ambiguous,unintelligible and uncertain in this, that in none of said counts is there any designation whatever of any certain or particular book, pamphlet or other matter as being lewd, lascivious or obscene.

And as well, moves to quash and strike out the words commencing on page two of said Indictment, at line five thereof at and including the words "and which, etc.," and from thence to and inclusive of the words "set forth," on line eleven of the same page, for that the same is surplusage, is immaterial and incompetent.

Wherefore he prays judgment and that he may be dismissed and discharged of said Indictment and of such parts and portions thereof as the said Court may decree are of no avail and he be not bound to answer.

BURNETTE G. HASKELL,
*Attorney for said Defendant.*

And at the same time the defendant interposed the following:

## DEMURRER.

And the said Warren E. Price, in his own proper person, comes into Court, and having heard the Indictment read, says that the said Indictment and the matters therein, and the whole thereof, are as therein alleged and set forth, not sufficient in law to compel the said Warren E. Price to answer thereto.

For that neither counts number one, two nor four are publications or advertisements or notices wherein obscene, lewd or lascivious matter may be had.

For that the said Indictment and each and every count thereof is ambiguous, unintelligible and uncertain.

For that the said Indictment and each and every count thereof doth not state a public offense. And that neither, nor any count thereof, doth state a public offense.

And this the said Warren E. Price is ready to verify.

Wherefore he prays judgment and that by the Court here he may be dismissed and discharged of the said indictment.

BURNETTE G. HASKELL,
*Attorney for said Defendant.*

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The Motion to Quash was granted as to the first, second and fourth counts, but denied as to the third and fifth, and the demurrer was overruled, to which decisions defendant duly excepted.

The following extracts from the Bill of Exceptions show the course of the trial and the points involved:

## BILL OF EXCEPTIONS.

BE IT REMEMBERED, that this cause came on regularly for trial at a regular term of said Court on the first day of April, A. D. 1896, the Hon. W. W. Morrow, District Judge for the Northern District of California, presiding, and Assistant United States District Attorney, Bert Slessinger appearing for the United States, and Burnette G. Haskell, Esq., appearing for the defendant.

A jury was regularly impanelled and the District Attorney made his opening statement to the jury.

JAMES W. IRWIN was called and sworn on behalf of the prosecution and testified as follows:

"I am United States Postoffice Inspector with headquarters at San Francisco. Have been such for eight years. I addressed a communication on October 8th, 1895, as follows:

I. Schwartz, Newsdealer, Crescent City, Cal.
Addressed to W. E. Price, 1203 Market St., San Francisco.
Date: October 8, 1895.

Dear Sir:—I have recently opened up business in this place and think from inquiries already made by millmen and lumbermen that I can sell a good many books of a spicy character. When in San Francisco a year ago I bought some very good French novels of you. Please send me a list of a few good sellers in this line, such as you think would take among a rather rough class of men. Let me know what your lowest price is for cash with order. I shall have to feel my way a little slow at first, but I think I can work into a good trade if I can satisfy my customers. Yours, I. SCHWARTZ.

I assumed the name of I. Schwartz for my correspondence with defendant. (Witness here produced a copy of the letter above). It was deposited in the mails by me and addressed to the defendant. It is an exact copy of the original mailed, as I copied it at the time of sending it.

To the introduction of this letter and all the others following, counsel for defendant objected on the ground that it was incompetent, irrelevant and immaterial and upon the further ground that no proper foundation had been laid, and that the same was a decoy letter inciting and provoking the commission of a crime on behalf of the government. The objection was overruled and the letters were admitted in evidence, to which ruling the defendant then and there excepted.

(The witness continued:)

"I gave instructions to Mr. T. J. Ford, Superintendent of the mails at the San Francisco Postoffice, to hold out any letter addressed to I. Schwartz, Crescent City, California.

On October 24, 1895, I addressed another letter, purporting to have been duly registered at Crescent City and the envelope was duly stamped and addressed to the Paper Covered Book Store, 1203 Market St., San Francisco, Cal. The letter was delivered at said place to W. E. Price, the defendant, and receipted for by him on a registry return receipt which was admitted in evidence. To the introduction of this letter and the receipt; counsel for defendant objected on the grounds as stated above. The objection was overruled, the letter and receipt admitted and defendant then and there excepted.

On the 7th day of November, I received through the San Francisco Postoffice Establishment, enclosed in an envelope addressed in type-writer, "I. Schwartz, Crescent City, Calif." and duly stamped, a book entitled "And Only a Boy," which book with identical text is also published under the title of "She." The envelope shows that it was transmitted through the mails, but counsel for defendant objected to its introduction in evidence, on the ground that it was incompetent and irrelevant and not shown to have been mailed by defendant. The Court overruled the objection and the book was admitted in evidence to which ruling defendant then and there excepted.

On November 11, I sent a letter which was registered, contained five dollars, and that letter and money were received by the defendant on November 15, 1895.

To the introduction of this letter defendant made the same objection that was made to the first letter: the objection was overruled, the letter admitted and defendant excepted.

On December 2, 1895, I received through the San Francisco Postoffice Establishment an envelope addressed "I. Schwartz, Crescent City, Calif., news dealer," duly stamped and postmarked, containing three books, one entitled "And Only a Boy," and the others "A Bride's Composition to a Lady Friend." They were offered in evidence by the Government; counsel for defendant objecting to their admission on the ground that the same were irrelevant and immaterial and not shown to have been mailed by defendant. The objection was overruled, the books admitted and defendant excepted.

On cross-examination witness testified as follows:

On or about the date it bears I received through the mails the following registered letter enclosing within it a five dollar gold piece:

(Heading Paper Covered Book Store, etc.)

(Addressed: I. Schwartz, etc.)

(Dated: December 11, 1895.)

Dear Sir:—We return the five dollars you sent for the double reason that you have asked us to, and that we are unable to secure the books you wished, though we have tried every place we could think of. Would have sent it a little sooner, but have been trying to get hold of paper money and could not.

Yours, Paper Covered Book Store.

The witness Irwin on cross-examination also stated that he knew one Frank Kane, the Secretary of the Society for the Suppression of Vice: that he had talked with Kane about defendant's case before his arrest, but that he had not told him of the decoy letters nor the means taken to procure evidence against the accused.

The defendant in his own behalf denied absolutely the sending of the books produced in evidence, but admitted having sent certain other books under the same titles as expressed in the indictment, which were admitted by the Government to be not obscene. He produced, and they were admitted in evidence, other copies of said books named "And Only a Boy," "A Bride's Composition," and other titles, all enclosed in wrappers and marked "price $2.00."

Defendant denied having sent or procured to be sent any one of the obscene books claimed to have been received by the government.

Defendant offered to prove that Frank Kane has an animus and hatred toward defendant and had threatened to have the machinery of the United States Court, used against him and offered to prove that defendant was the object of religious persecution at the hands of Kane, from which he would seek to have the jury draw the inference that Kane or some of his agents had sent the books in question.

But on a further examination of Irwin, he testifying that he communicated his correspondence to no one, the Court disallowed the evidence on this point, to which the defendant then and there duly excepted.

The jury afterwards returned a verdict of guilty as charged on both the counts of the indictment.

Defendant thereafter made a motion in arrest of judgment which was denied by the Court, to which decision defendant then and there duly excepted. The said motion in arrest of judgment was as follows:

## IN ARREST OF JUDGMENT.

Now comes the above named defendant in the above entitled cause and moves the Honorable Court herein that the Judgment in the said cause may be arrested and set aside and the said defendant be discharged herein and go free, on the following grounds to wit:

That the third and fifth counts of the Indictment herein do not state a public offense under the laws of the United States.

That this Honorable Court that hath tried, convicted and is about to sentence said defendant under said counts hath and had no jurisdiction in the premises.

That said third and fifth counts of said Indictment do not nor do neither of them with any certainty, accuracy, precision, directness nor sufficiency show the facts or elements necessary to constitute an offense under the laws of the United States. That the same and each of them is ambiguous unintellible and uncertain and a mere expression of opinion in this: that it is nowhere in either of of said counts alleged that the said books or pamphlets or either of them were in fact obscene, lewd or lascivious, or of an indecent character or were non-mailable matter.

Wherefore defendant prays dismissal and discharge of said indictment. Very respectfully,

BURNETTE G. HASKELL.

San Francisco, April 7, 1896. Att'y for said defend't.

Whereupon the Court fixed upon Thursday, April 14, 1896 as the day for sentence when the defendant moved the Court for a new trial upon the following grounds:

MOTION FOR NEW TRIAL.

And now on this Fourteenth day of April, 1896 in open Court and before the passing of sentence herein comes the said defendant and the District Attorney of the United States for said Northern District being then and there present, and said defendant then and there moves for a new trial of said cause upon the following grounds to wit:

1. That the Court erred in overruling defendant's demurrer to the Indictment herein.
2. That the Court erred in refusing to quash the whole of said Indictment.
3. That the Court erred in admitting and rejecting evidence on the trial of said cause. And in the decisions of questions of law arising during the trial.
4. That the Court erred in denying defendant's motion for an arrest of judgment herein.

The motion for a new trial was thereupon denied, to which ruling the defendant then and there duly excepted.

The defendant was thereupon sentenced to eighteen months' imprisonment in the California States Prison and to pay a fine of five hundred dollars.

Subsequently, and within the statutory time, defendant served and filed his notice of Appeal and applied for a Writ of Error to the Supreme Court of the United States.

And defendant now assigns and specifies the following errors upon which he will mainly rely upon said appeal and Writ of Error:

1. That the Court erred in overruling defendant's demurrer to the indictment.
2. That the Court erred in refusing to quash the whole of said indictment.
3. That the Court erred in admitting the evidence of witness Irwin as to the decoy letters.
4. That the Court erred in refusing to permit the de-

fense to go into the matter of Frank Kane's animus and interest.

5. That the Court erred in denying defendant's motion for arrest of judgment.

6. That the Court erred in denying defendant's motion for a new trial.

The motion for a new trial as stated was denied, to which defendant excepted, and defendant was thereafter sentenced, as stated.

## POINTS AND AUTHORITIES.

### First Point.

*That the said Indictment does not in* ANY *sense charge a public offense, and that the Motion in Arrest of Judgment should have been granted by the lower Court and the said defendant discharged therefrom.*

The statute reads:—

"Every obscene, lewd or lascivious book, pamphlet .... or other publication of an indecent character .... are hereby declared to be non-mailable matter ....

Any person who shall knowingly deposit . . ; . anything declared by this statute to be non-mailable matter .... shall etc., etc., etc."

The corpus delicti in this offense is:—

1. That deft. deposited something.
2. That what was deposited was non-mailable matter:
   (a) That it was obscene, and
   (b) Of an indecent character.
3. That defendant knew it was obscene when he deposited it; not merely that he knowingly deposited it and knew he deposited it.

As sustaining this statement of the ultimate facts see:

*U. S. vs. Bebout, 28 Fed. Rep. 522,*

*Bates vs. U. S., 11 Biss., (U. S.,) 70, s. c., 10 Fed. Rep., 92,*

*U. S. vs. Clark, 37 Fed. Rep., 106.*

As sustaining the point that the allegation as to knowingly depositing, must be knowing the same to be obscene, not merely that he knew he deposited something., see:—

*U. S. vs. Slenker, 32 Fed. Rep., 106.*

*U. S. vs. Jackson, 2 Fed. Rep., 502.*

But further in this matter if as we shall later show that in case at bar there is NO ALLEGATION WHATEVER *of obscenity*, NOR *of non-mailable character* DIRECTLY (nor even *indirectly*) made, then there of course, *can* be no allegation whatever of knowingly depositing anything even afterwards alleged to be "obscene."

That would take this case *out* of the rule laid down in (contra)

*U. S. vs. Clark, 37 Fed. Rep., 106,*

and

*U. S. vs. Bennett, 16 Blatchford, 338.*

The ultimate facts in this cause must be stated with certainty and precision or the Indictment is bad.

There is no statement whatever here either that:—

1. The said book is obscene,
2. Or that it is non-mailable matter,
3. Or that it is obscene and of an indecent character,
4. Or that it is of an indecent character.

The statement made here is a mere expression of the pleaders opinion and inference, that said book is *so* obscene, that it *would be* offensive if set forth in full in this indictment and thus become part of a permanent public record, contrary to the form of the statute etc.—It does not even state that it is *too* obscene *to be* set out; it is indirect even here, an opinion even here,—it says it "*would be . . . if.*" But the opinion of the pleader is *not* that the book IS obscene but that it *would be* obscene, *if* something—not too obscene to constitute non-mailable matter, but simply *would be* obscene *if* set out some-

where or other. For instance:—

On indecent assault—The character of which assault was so indecent that it would be offensive if set out in this indictment, etc.

On murder—The character of which shooting was so fatal that the man ought to be hanged.

An invalid is asked: "Is it far down town?" He replies: "It is so far that I cannot walk it." That does not state a fact—not the fact that it *is* or is *not* far, but only speaker's opinion and conclusion, involving another fact, to wit: his *ability to walk*. So this Indictment states an opinion and conclusion of pleader on the question of TASTE, as to whether the matter *would be* offensive *if* set out. His pleading is not even good to prevent it *being* set out, because it even on that point makes no direct (nor even *indirect*) statement: that it *is* too offensive to be set out, but only *would be if* set out. It is only an opinion on that minor point as well.

"So," is a qualifying word. "So . . that" makes an adverbial qualification, absolutely involving an opinion and preventing absolutely a direct statement of a fact.

"So handsome that I admire it," is no statement that a thing is handsome.

The Indictment should have followed the words of the statute; and, as well, this being more than an indictable misdemeanor, should have thoroughly identified the book. For instance, a proper indictment here would be:

"Said pamphlet is, and was, then and there, non-mailable matter, to wit: that the same is and was obscene, lewd and lascivious, and of an indecent character. The title of said pamphlet is, "And Only a Boy," it consisting of ten pages, beginning with the words: "On one day," etc., and ending with the words, "last night;" its text and contents being not set out herein, for that they are too obscene to be here set out, etc. . . .

This obscenity charged in the case at bar clearly DOES NOT *relate to the book*, but only to the immaterial issue, as to whether the book *is too* obscene to be set forth on a public record. This is not a crime.

It might be too obscene to be read in a young girls' school where the pupils are but twelve years of age, and still *not* be so obscene as to be non-mailable matter.

For instance: The Bible is obscene in parts (Solomon's Song for instance), but *not* unmailable; many other books the same way.

The story of Noah and his daughters is so obscene that it would be offensive to read in Sunday School, but it is not, therefore, non-mailable matter.

Obscene matter must be *indecent* in character as well; this is the wording of the statute, and it should be followed.

A thing can be ribald and not indecent.

A mere obscene or vulgar book does not come within the statute. There are cases on this point:

"The matter must be such as will excite the passions —not merely coarse or vulgar. . . ."

*U. S. vs. Males, 61 Fed. Rep., 41 (D. C. Ind.)*

There is no question in the world but that there are degrees in obscenity.

And that some things may be obscene and yet not indictable; that the Supreme Court has only lately so decided can be seen by reference to the case of

*Swearingen vs. the United States, 16 S. C. Reporter, 562.*

The setting out of words in some indictments and the not setting them out in other cases, shows degrees.

Must it therefore not appear on the face of the Indictment that it is of such a degree of obscenity as to be non-mailable matter?

But in the case at bar the allegation that the book "WOULD" be obscene, or rather, in its words, "*would* be so

obscene that it *would* be offensive," expresses the mere pleader's opinion. It might be offensive to Smith and not to Jones; to Williams and not to Doe. In the case of People *vs.* Worthington tried before the Superior Court of San Francisco, one judge, Judge Belcher, held that certain words were too obscene to be repeated aloud in the court room. In the same case on another trial, Judge Wallace of another department of the same court, held that the same words were not so obscene as to prevent their being spoken aloud in court and taken down by the short-hand reporter. The way this allegation is made here it is nothing more or less than A MERE INTENDMENT *and opinion*, and not even *that* stated with clearness or precision. In no indictment examined has there ever been one found that even approaches this one in so nearly absolutely declaring nothing at all. The crime charged here simply is that defendant deposited matter which would be offensive if spread on a public record. Tar would be so offensive. Is that a public offense?

*There is no charge here that this is a publication.* It might for all that appears on the face of the Indictment be the printed record of a judicial proceeding.

There is no charge here that it is the wording or pictures of the book "that would be offensive."

If the book were one whose pages were composed of leaves of assafœtida, and all impregnated with smallpox germs, it would, of course, be "offensive,"—but still not unmailable matter under the statute here in question.

## ON THE GENERAL PROPOSITION.

"All the material facts and circumstances comprised in the definition of the offense. . . . must be set out, . . . . If any one material fact or circumstance be omitted the indictment will be bad."

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"The charge must be laid POSITIVELY and not *inferentially* nor by way of recital merely. (2 Hawk. ch. 25, s. 60). Therefore a material fact laid in an indictment after a *whereas* would render the indictment bad. (2 Hawk., c. 25, sec. 60-61.) So the want of a *direct* allegation of anything material in the description of the substance, nature or manner of the offense cannot be supplied by ANY INTENDMENT or IMPLICATION whatever. . ."

*1 Archibald, P. & P. 87-1.*

"General charges of violating public decency are insufficient to authorize any judgment. The specific acts and circumstances of indecency must be set out."

*State vs. Branson, 2 Bailey 148.*

*Commonwealth vs. Maxwell, 2 Pick. 139.*

*State vs. Scribner, 2 Gill & Johns. 246.*

*Randolph vs. Commonwealth, 6 Serg. & Rawl. 398.*

*Commonwealth vs. Gillespie, 7 Id. 469.*

*Updegraff vs. Commonwealth, 6 Id. 5.*

*State vs. Dent, 3 Gill & Johns. 8.*

*Swearingen vs. U. S., 16 S. C. Rep. 562.*

As to indictment not even following statutory language, see generally:

*Am. and Eng. Encly. Law, vol. 10, page 351.*

It has long been held, we believe, and rightly so, if the general spirit and tenor of the decisions be considered, that it is not sufficient to describe a book *by its title* only without setting out the words charged as obscene,—or at least if they are too obscene to be set out describing their character and tenor explicitly. The defect is not cured by a verdict of guilty and is available either as a ground for arrest of judgment or for reversal on error.

*Bradlaugh vs. Regina, 3 L. R. Q.B. Div., 607*
*s. c., 38 L. T. N. S., 118.*
*s. c., 26 W. R., 410, C. A.*
*Com. vs. Wright, 139 Mass., 382.*
*McNair vs. People, 89 Ill., 441.*

*State vs. Brown. 27 Vt., 619.*
*People vs. Hallenback, 52 How. Pr. 502.*
*Thomas vs. State, 103 Ind. 419.*
*U. S. vs. Clarke, 38 Fed. Rep. 500.*
*Com. vs. Holmes, 17 Mass. 336.*

If general tenor and purport not given it is defective.

*U. S. vs. Harmon, 34 Fed. Rep. 872.*
*People vs. Hallenback, 52 How. Pr. 502.*

Generally.

*U. S. vs. Foote, 12 Blatch. 418.*
*U. S. vs. Kelley, 3 Sawyer 566.*

An indictment is bad where the charge is by implication or recital—(lottery).

*U. S. vs. Smith, 45 Fed. Rep. 561.*

On sec. 3893 not good unless follows the language of statute.

*U. S. vs. Grimm*, 45 *Fed. Rep. 558.*

An essential element cannot be supplied by implication.

*Pettibone vs. U. S., 148 U. S. 197.*
*U. S. vs. Hess, 124 U. S. 483.*

Words of the statute must be accompanied with such a statement of the facts as will inform of the specific offense.

*U. S. vs. Hess, 124 U. S. 483 (also says verdict does not cure).*
*U. S. Conant, 9 Cent. L. J. 129.*
*U. S. vs. Noelke, 1 F. R, 426, 17 Blatch. 554.*

## THE ROSEN CASE.

Upon a brief argument of these points before Judge W. W. Morrow on argument of defendant's motion in Arrest of Judgment, on the first day Judge Morrow expressed

himself as believing the points to be well taken, but reserved his decision in order to examine the Rosen case, advance sheets of which decision had just arrived.

After such examination which was necessarily hasty the Judge the next day denied the motion in Arrest of Judgment upon its authority, evidently misapprehending the real scope and purpose of the Rosen decision.

That there may be no possible misapprehension as to the real meaning of that case and to show conclusively that it not only is *not* antagonistic to our contention but is in fact thoroughly in *support* of it,

We cite from 16 Supreme Court Reporter, pages 434 to 439 and pages 480 to page 483:

First:—Let us say that the Rosen case and the Price case are, in their facts and pleadings, in no wise parallel, as the Honorable District Judge seemed to think. Their salient differences are shown by an inspection of the opinion of the Court:

In the Rosen case it appears first:

"The defendant pleaded not guilty and the trial was entered upon *without objection in any form* to the indictment as not sufficiently informing the defendant of the nature of the charge against him." (p. 434.)

But in the case at bar full objection WAS taken

1. By demurrer, which see p. 11 this brief. And

2. By a full and comprehensive Motion to Quash the said Indictment and the whole thereof. Which see, p. 11, this brief.

Again in the Rosen case the indictment charged:

"The accused did, . . . knowingly, . . . deposit . . . a certain obscene, lewd and lascivious paper which said paper, on the first page thereof, was entitled "Tenderloin Number, Broadway," and on the same page were printed the words and figures following, . . . etc. . . . and thereupon on the same page is the picture, . . . . etc., . . . and the said paper consists of 12 pages, mi-

nute description of which with the pictures therein and thereon would be offensive to the court and improper to spread upon the records of the court because of their obscene, lewd and indecent matters. . . ." (p. 435.)

It will be noticed at once therefore that in the Rosen case:

1. That THAT indictment DID charge *in terms* that the paper in question *was* obscene, lewd and lascivious. In the Price case no such direct allegation was made.

2. That in the Rosen case the description of the paper is certainly full enough to permit of its after identification, whereas in the Price case it is as certainly *not*. In the Rosen case the paper is identified by giving:

(a) The title: "Tenderloin Number, Broadway."

(b) The whole of the printed contents of the first page.

(c) A description of the picture on the first page.

(d) A statement that the paper consists of twelve pages.

(e) A statement that those twelve pages or some of them contained pictures and minute description.

In the Price case each and every one of these descriptive features is absent save and except the title. The Price indictment reads simply: "A printed book and pamphlet entitled 'And Only a Boy.'"

Again: In the Rosen case on page 435 in deciding that the omission of the indictment to charge that defendant knew the matter was obscene when he deposited it, the Court calling attention to the formal words "knowingly deposited" found therein, while *not* approving of so loose a method of pleading, holds that the omission to directly charge the knowledge at the time of the deposit, was cured by the verdict, being one of mere form, under section 1025 of the Revised Statutes. The Court says:

"The case is therefore NOT ONE of the TOTAL omission from the indictment of an ESSENTIAL AVERMENT, but at most one of inaccurate or imperfect statement of a fact."

But in the case at bar the case precisely is the TOTAL omission of an ESSENTIAL averment. There is no averment whatever that the book was either ob cene, or lewd or lascivious, or non-mailable matter.

Again: On the same page the Court says:

"A defendant is informed of the nature and cause of the accusation against him if the indictment contains such a description of the offense charged as will enable him to make his defense and plead the judgment in bar to any further prosecution of the same crime. Does the indictment in this case meet these requirements? It describes the paper alleged to be obscene, lewd and lascivious with such minuteness as to leave no possible doubt as to its identity."

It is certain that in the Price case no such description whatever is given.

And we call the Court's attention to the fact that on the trial defendant denied he sent the books produced, but averred that he did send other books, not admittedly obscene, of the same or similar title, and he produced samples thereof in Court.

There is nothing WHATEVER in this Indictment to show that it was not actually one of these other books that was produced before the Grand Jury and upon which the Indictment was founded; there is nothing to show that the veritable book on which the Indictment was founded was produced in Court. If the defendant came into Court prepared to prove that the other book was not obscene, believing he was indicted upon that book, and was there met by this book produced in proof which is absolutely obscene and to which his objections that it was not obscene would not lie, and was told by the witness (a Government agent given to decoys), that *that* was the

book on which he was indicted, and if the Indictment itself did not sufficiently identify the book on which the Indictment was really founded, could such oral testimony be taken to supplement the solemn and formal act of the Grand Jury? We take it certainly not.

Were such a monstrous proposition as this to be incorporated into the law of the land what possible security to life or liberty could any citizen have? Why, the Grand Jury itself may not be questioned as to what passes in their councils. Their Act is the Indictment and that must speak for itself.

Again: there being a question as to *which* book was really before the Grand Jury and the Indictment had upon, on a second indictment how could defendant identify which book it was by reference either to the Indictment or the Verdict or Judgment?

Again: The Court in reasoning upon the decision of Lord Chief Justice Cockburn's decision in the celebrated Bradlaugh case and that of Lord Justice Brett in the same case on appeal, does not say a single word in opposition to the points urged by us now, though Judge Morrow (on mere hasty reading of the advance sheets), possibly misapprehending the difference between "print," (meaning a picture) and "print" meaning printed words, used this case of Bradlaugh's as quoted, as a quasi endorsement of his order overruling our motion in Arrest of Judgment.

Justice Cockburn said the objection should have been taken by demurrer.

*Queen v. Bradlaugh, 2 Q. B. Div. 569, 573.*

On appeal Justice Brett overruled him and said that without demurrer the fault could be taken by Motion in Arrest of Judgment but he further said as cited by this Court in the Rosen case:

"I would strike out of the category of the cases which we are considering all cases with regard to obscene prints and pictures, . . . they are NOT WORDS. . . ."

*Bradlaugh v. Queen, 3 Q. B. Div. 607, 634.*

Again: None of the cases cited, as follows, in the Rosen decision *are* on all fours with the Price case.

In NO ONE of them was there any failure to allege *directly* that the matters WERE OBSCENE. In each one of the cited cases the records of the cases show that the indictment invariably charged that the article WAS OBSCENE.

*Com. vs. Sharpless, 2 Serg. & R., 91, 102.*
*Com. vs. Holmes, 17 Mass. 336.*
*Com. vs. Cance, 164 Mass. 162, 41 N. E. 133.*
*People vs. Girardin, 1 Mich. 90, 91.*
*State vs. Brown, 27 Vt. 619.*
*McNair vs. People, 89 Ill. 441.*

In the dissenting opinion in the Rosen case given by Mr. Justice White and Mr. Justice Shiras and found on pages 480 et sequunter there are a number of reasons and considerations that seem to us applicable here.

This Indictment absolutely fails to give any identifying reference whatever to that which the Grand Jury found to be obscene.

"It must be described so far that its obnoxious character may be discerned."

*Grimm vs. U. S., 156 U. S. 164.*

In this dissenting opinion the matter is argued fully as follows:

"Where the obscene matter is not spread on the face of the indictment and is excused under the averment that it would be offensive to morality to do so, is the indictment valid where it gives no specific reference iden-

tifying the matter found by the Grand Jury to be obscene, thus rendering it impossible to determine upon what the Grand Jury based its presentment?

"In considering this question it must be borne in mind that imprisonment at hard labor in the penitentiary is the penalty which may be imposed for sending obscene matter through the mails; hence, the offense is an infamous one. (Citing:)

*Macklin vs. U. S., 117 U. S. 348.*
*s. c., 6 Sup. Ct. 777.*
*Ex parte Wilson, 114 U. S. 417.*
*s. c., 5 Sup. Ct., 935.*
*In re Claussen, 140 U. S. 200.*
*s. c., 11 Sup. Ct. 735.*

"It also must be considered that being an infamous offense the prosecution can, under the Fifth Amendment to the Constitution, only be by indictment. The necessity for IDENTIFYING references in the INDICTMENT to the obscene matter upon which the Grand Jury makes its finding is an ESSENTIAL PART of the rule dispensing with the obligation of stating the obscene matter in so many words in the indictment. The reason on which the English rule rests is that spreading in full the obscene matter is essential to protect the accused in his rights, to enable him to move to quash, or in arrest of judgment, or to present on review by error the validity or invalidity of the indictment. The American rule is based upon the reason that such spreading upon the record is not essential to protect the rights of the accused because the obscene matter passed on by the Grand Jury can be so identified by a reference to it IN THE INDICTMENT as to enable it to be, by bill of particulars or otherwise, readily supplied for all the purposes of defense; hence, the omission deprives the accused of no

substantial right, while subserving the ends of public morality and decency.

The authorities make this clear. Thus in *Grimm vs, U. S., ubi supra*, the Court said:

"It is enough to SO FAR describe it, obscene matter that its obnoxious character may be discerned." (But in the Price case at bar it is not described AT ALL.)

## OTHER RECENT CASES.

In one of the most recent cases decided by the Supreme Court, the following language was used:

"The true test is not whether it might possibly have been made more certain, but whether it contains *every* element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and in case any other proceedings are taken against him for a similar offense, whether the *record* shows with accuracy to what extent he may plead a former acquittal or conviction." (Citing,

*Evans vs. U. S. 153 U. S. 584, 587. 588.*

*Batchelor vs. U. S. 156 U. S.* 426.)

*Cochrane & Sayer vs. U. S., 157 U. S.* 290, *Oct. 1894.*

This is identically the test which should have been applied in the case at bar.

The testimony in this case showed that there were introduced in evidence other books of practically the same titles, the only method of description made in the Indictment, sent by the defendant at the same time and —not—admittedly obscene. Who now can say from the mere inspection of the Indictment and Judgment in Court on what particular book or books Price was convicted?

In the leading case of Evans against the United States

*Evans vs. the United States, 153 U. S., 587,*

the Court lays down the principles covering the point at issue in the following clear and luminous words:

"The case involves the sufficiency of an indictment.

"A rule of criminal pleading which at one time obtained in some of the circuits, and *perhaps* received a qualified sanction from this court in *U. S. vs. Mills, 7 Pet. 138*, that an indictment for a statutory *misdemeanor* is sufficient if the offense be charged in the words of the statute, *must under* more recent decisions, be *limited* to cases where the words of the statute themselves (as was said by this Court in *U. S. vs. Carll, 105 U. S. 611, 612*) *'fully, directly* and *expressly* WITHOUT ANY *uncertainty* or ambiguity, set forth ALL the elements *necessary* to constitute the offense intended to be punished.' The crime *must* be charged with *precision* and certainty and *every ingredient* of which it is composed must be *accurately* and *clearly* alleged. (*U. S. vs. Cook, 17 Wall. 168, 174—U. S. vs. Cruikshank*, 92 U. S. *542-558.*)

"'The fact that the statute in question read in the light of the common law, and of the other statutes on the like matter, enables the Court to *infer* the intent of the legislature DOES NOT DISPENSE with the NECESSITY of *alleging* in the indictment ALL the facts necessary to bring the case within that intent.' (*U. S. vs. Carll, 105 U. S., 611.*

"*Even* in the cases of *misdemeanors* the indictment must be free from *all ambiguity*, and leave *no* doubt in the minds of the accused and the Court of the *exact* offense intended to be charged, not only that the former may know what he is called upon to meet, but that, on a plea of former acquittal or conviction, the record may show with accuracy the exact offense to which the plea relates.

*U. S. vs. Simmons, 96 U. S. 360.*
*U. S. vs. Hess, 124 U. S. 483.*
*Pettibone vs. U. S. 148 U. S. 197.*
*In re Greene 52 Fed. Rep. 104.*"

In Mr. Justice Field's dissenting opinion on p. 599, s. c. (*Evans vs. U. S.*), he says citing *U. S. vs. Britton, 107 U. S., 669.*

"The words 'wilfully misapplied' used in the section upon which the present indictments were found were considered and the Court speaking by Mr. Justice Wood said:

'The words 'wilfully misapplied,' are, so far as we know, new in the statutes creating offenses, and they are not used in describing any offense at common law. They have no settled technical meaning, like the word 'embezzle' as used in statutes or the words 'steal, take and carry away,' as used at common law. They do not therefore of themselves fully and clearly set forth every element of the offense charged. It would not be sufficient simply to aver that the defendant 'wilfully misapplied' the funds of the association. This is well settled by the authorities we have already citied. There must be averments to show how the application was made and that it was an unlawful one.'

"A party is not to be condemned by the multitude or opprobriousness of the adjectives applied to his conduct or motives unsupported by the facts, or, as said by Lord Chief Justice Holt, "a fact that appears to be innocent cannot be made a crime by adverbs of aggravation.'

(Citing U. S. *vs.* Watkins, 3 Cranch C. C. 441.)

These authorities could be signally multiplied, but further citation is deemed unnecessary.

We urge upon the Court that in this cause there is always to be considered what we have first pointed out; that nowhere in this Indictment is it anywhere or in anywise charged that defendant was guilty of sending obscene matter, or non-mailable matter *per se*, through the mails, but only with depositing something which was too obscene to be spread upon a public record.

## SECOND ~~COUNT~~ Point,

The plaintiff in error in the second point advanced in his Assignment of Errors approaches it with some diffidence. The point made is this:

On the question of decoy letters, plaintiff in error contends that error was committed by the District Judge in admitting in evidence any of the letters of the post-office inspector, Irwin, and any of the replies received in response thereto for this reason: It does not appear, from Irwin's testimony or otherwise, that defendant had been engaged generally in the business of sending obscene matter through the mails; but it does appear that the first letter came from Irwin, then and there a Post Office Inspector, and a Representative of the Government, who wrote to him (the defendant) under a false name, a letter which was clearly PROVOCATIVE, and a clear *incitement* to violate the laws of the United States.

The letter in terms was as follows:

(Heading.) October 8, 1895.
W. E. Price,
1203 Market street.
"*Dear Sir:*
"I have recently opened up business in this place, and think from inquiries already made by mill-men and lumber men that I can sell a good many books of a *spicy* character. When in San Francisco a year ago I bought some very good *French Novels* of you. Please send me a list of a few *good sellers* in this line, such as you think would *take well among a rather rough class of men*. Let me know what your lowest price is for cash with order. *I shall have to feel my way a little slow at first*, but think I can work into a good trade if I can satisfy my customers. Yours,
I. Schwartz."

We admit that a decoy letter is permissable where there is evidence that the defendant has been engaged

in the commission of the crime at times past. But in this case there neither is nor was such evidence.

We contend that the employment of *agents provocateurs* is not sanctioned, and never has been sanctioned by the Anglo-Saxon law; that this infamous method of extracting evidence through *inciting* the *commission* of crime, is opposed to all the fundamental principles of our legal system, and has never been tolerated by either England or America.

We believe that this Honorable Court in its various decisions in the cases of

*U. S. vs. Slenker, 32 Fed. Rep. 694,*
*U. S. vs. Wightman, 29 Fed. Rep., 636,*
*U. S. vs. Whittier, 5 Dill 35,*
*Bates vs. U. S., 10 F. R. 92, Note,*
*U. S. vs. Bott, 11 Blatch., 346,*
*U. S. vs. Pond, 2 Curt, 265,*
*U. S. vs. Foy, 1 Curt. 364.*
*U. S. vs. Cottingham, 2 Blatch, 470,*
*U. S. vs. Rapp, 30 F. R. 818,*
*U. S. vs. Grimm, 50 F. R. 674,*

meant simply to permit decoy letters for the purpose of DETECTING CRIME, not for the purpose of INCITING it, and we ask on this print on the authority of

*U. S. vs. Adams, 59, F. R. 674*

the consideration of this Honorable Court on the grave and important Constitutional and moral question here involved.

Respectfully submitted,

WARREN E. PRICE,
*In propria persona.*

BURNETTE G. HASKELL,

*Of the Bar of the Supreme Court of the State of California, since 1878, but not admitted to the United States Supreme Court.*

*Of Counsel by courtesy.*

165-311

Office Supreme Court, U. S.
FILED
JAN 18 1897
JAMES H. McKENNEY,
CLERK.

165-311.

# In the Supreme Court of the United States.

OCTOBER TERM, 1896.

WARREN E. PRICE
*v.*
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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

## BRIEF FOR THE UNITED STATES.

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**IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.**

## BRIEF FOR THE UNITED STATES.

### STATEMENT.

Plaintiff in error was indicted on the 14th day of January, 1896. The indictment contained five counts. The first, second, and fourth counts were quashed. (Rec., p. 8.) The third and fifth counts charged plaintiff in error with depositing in the United States mails for mailing and delivery envelopes containing obscene literature. (Rec., pp. 4, 6.) On the trial he was found guilty and sentenced to eighteen months' imprisonment, and to pay a fine of $500. (Rec., p. 15.)

James M. Irwin, post-office inspector, testified that in October, 1895, his attention was called to the fact that

plaintiff in error was engaged in using the mails in the dissemination of obscene literature, and that upon this information he acted. (Rec., p. 10.) There is no testimony in the record contradicting this, and no cross-examination to weaken the force of the statement.

On October 8, 1895, Irwin, under the assumed name of I. Schwartz, of Crescent City, Cal., addressed a communication to W. E. Price, 1203 Market street, San Francisco, Cal., stating that he (Schwartz) had recently opened up business at Crescent City, and that from inquiries made of millmen and lumbermen he thought he could sell a good many books of a spicy character, and asked Price for a list of a few good sellers in this line. This letter was deposited in the mails. Irwin instructed the superintendent of mails at the San Francisco post-office to hold out any letters addressed to I. Schwartz, Crescent City, Cal.

On October 14, 1895, Irwin received from the San Francisco post-office, inclosed in an envelope, stamped and postmarked, and addressed to I. Schwartz, Crescent City, Cal., a communication signed by the "Paper Covered Bookstore," 1203 Market street, San Francisco, as follows:

> I have no list which covers anything like all the so-called "hot" books, but in case you wanted some I could guarantee not to put in anything which was not pretty good stock. There are not more than fifty such books on the market, and the number is decreasing instead of the other thing. Nearly all retail at fifty cents, and there is an average discount of forty per cent.

> They would have to go to you by freight or express, as such books can not go through the mails. You could take as few or as many as you wish at a time, and in case that you considered that you had been stuck in any sense, would give you credit on its being returned in good condition.
>
> Will mail you sample copies of magazines which may interest you more or less. One of them will give you some information. (Rec., p. 11.)

Irwin received from the post-office sample copies of magazines addressed to I. Schwartz.

On October 24, 1895, Irwin, all the time acting under his assumed name, addressed a letter to the Paper Covered Bookstore, inclosing $2, for which he requested sample copies of Scarlet Sin, Gilded Vice, and Tessie's Temptation, and such other books of that character as the balance would procure. Also stating that one of his customers would like to procure a copy of She. This letter was sent by registered mail.

On October 31, 1895, Irwin received through the post-office a communication, signed by the Paper Covered Bookstore, as follows:

> I have sent you Decameron, Voluptuous Duchess, Seventh Commandment, and Gilded Vice. All cost 25c. each, except the last, and that is 15c., postage extra. In a day or two I will send you the other book of which you wrote, and that will just even up the $2.
>
> Do not take less than a dollar for it. It is small, but comes high. If people will read such books, let them pay for them.
>
> They are worth about 30c. wholesale, and not many to be had. (Rec., p. 12.)

On November 7, 1895, Irwin received through the San Francisco post-office, addressed to I. Schwartz, a book entitled And Only a Boy, which book, with identical text, is also published under the title She.

On November 11, 1895, Irwin again wrote to the Paper Covered Bookstore, inclosing $5, and ordering more books of the same kind. This letter was sent by registered mail. Defendant admitted that he received this letter and money.

On November 28, 1895, Irwin received a communication signed by the Paper Covered Bookstore, as follows:

> You must be thinking your five was taken in and done for. The fact is that I am not able to get hold of anything of the kind you ordered except two titles, and one of those is the same as I sent you before. I wanted to get all at one time and send by express, as that is cheaper. If I can get nothing more, will send a couple of each that I have, and then you can tell me whether to return balance of money or send more of same. The Night in a Moorish Harem once was very common here and wholesaled at about four bits, but now no one seems to have a copy to sell or loan. You will hear from me in a day or two without fail. (Rec., p. 13.)

On December 2, 1895, Irwin received from the San Francisco post-office an envelope addressed to I. Schwartz, containing three books, one entitled And Only a Boy and the others A Bride's Composition to a Lady Friend.

Attention is called to the fact that all of the above communications signed by the Paper Covered Bookstore are written in the first person.

Under date of December 11, 1895, the Paper Covered Bookstore returned the 85 sent by Irwin under the name of Schwartz, for the reason that he asked for its return, and also because said bookstore was unable to secure the books.

Price was the proprietor and manager of the Paper Covered Bookstore. (Rec., p. 14.)

Price denied having sent the books introduced by the prosecution. (Rec., p. 14.)

The book entitled And Only a Boy was admitted at the trial to be "obscene, lewd, and lascivious, and within the scope of the statute." (Rec., p. 12.)

Outside of the letters of defendant, there was no direct proof that he mailed the obscene books, except what might have been inferred by a comparison of the typewriting in defendant's letters with the typewritten address on the envelopes containing the books, it being contended by the Government that the addresses showed the same peculiarities of typewriting as shown in Price's admitted letters. (Rec., p. 15.)

The letter carrier on whose route is store No. 1203 Market street, San Francisco, testified that he always delivered letters addressed to the Paper Covered Bookstore, when registered, to W. E. Price, and that Price would generally sign receipts for such letters as proprietor. (Rec., p. 14.)

It was admitted that Price sent the letters addressed to Schwartz. (Rec., p. 14.)

POINTS AND ARGUMENT.

I.

The first point relied on by plaintiff in error for reversal is that the indictment fails to charge a public offense within section 3893 of the Revised Statutes. The statute as amended reads as follows:

> Every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where or how, or of whom, or by what means any of the hereinbefore-mentioned matters, articles, or things may be obtained or made, whether sealed as first-class matters or not, are hereby declared to be nonmailable matter, and shall not be conveyed in the mails nor delivered from any post-office nor by any letter carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of the same, shall, for each and every offense, be fined upon conviction thereof not more than five thousand dollars, or imprisoned at hard labor not more than five years, or both at the discretion of the court. And all offenses committed under the section of which this

> is amendatory, prior to the approval of this act, may be prosecuted and punished under the same in the same manner and with the same effect as if this act had not been passed: *Provided*, That nothing in this act shall authorize any person to open any letter or sealed matter of the first-class not addressed to himself. (25 Stat., 496.)

The elements necessary to constitute the offense in this case are depositing or causing to be deposited, knowingly, in the United States mails, for mailing and delivery, an obscene, lewd, or lascivious book.

The third and fifth counts of the indictment are alone involved. (Rec., pp. 4, 6.)

The third count charges that the defendant did "willfully, knowingly, unlawfully, and feloniously deposit and cause to be deposited in the mails of the United States at and in the said city and county of San Francisco, for mailing and delivery, a certain sealed envelope, upon which said sealed envelope there were then and there two postage stamps of the United States, each of the denomination of 2 cents, unused and uncanceled, and a typewritten address as follows, to wit: 'I. Schwartz, Crescent City, Cal.;' which said sealed envelope then and there contained a printed book and pamphlet entitled And Only a Boy, the character of which is and are so obscene, lewd, and lascivious that said book and pamphlet would be offensive if set forth in full in this indictment," etc. (Rec., p. 4.)

The fifth count was the same in substance. (Rec., p. 6.)

Thus it appears that the indictment charged that defendant did knowingly deposit said book. It was held

in *Rosen* v. *United States* (161 U. S., 29, 31) that this was sufficient on this point.

In the same case (p. 42) Mr. Justice Harlan said:

> Everyone who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious.

In the recent case of *Wilson* v. *United States*, on the motion for a rehearing, which was denied, the point was distinctly made by counsel for plaintiff in error, on pages 3 to 10 of his brief, that the allegation "knowingly deposit" did not sufficiently charge that the deposit was made with knowledge of the character of the publication. In that case the point was made that the objection was taken by demurrer, and it was thus thought to distinguish it from the Rosen Case, in which the correctness of the indictment was challenged for the first time by motion in arrest (p. 4).

The averment is that the book in question was "so obscene, lewd, and lascivious that said book and pamphlet would be offensive if set forth," etc. This is the same as saying that it was obscene, lewd, and lascivious, and to that degree that it would be offensive if set forth in full.

While every fact and circumstance which is essential to make out an offense must be alleged directly, not argumentatively, and can not be helped out by argument or inference, the rule is that facts which are necessarily implied from facts stated need not be expressly alleged. (Clark's Crim. Proc., p. 164.)

Bishop says that nice objections, where the sense is clear, will be disregarded, if what is meant is duly distinct and obvious. (1 Bishop's New Crim. Proc., sec. 511.)

The indictment identifies the book by name. This was sufficient under the authority of *Durland* v. *United States*. (161 U. S., 306, 314). In that case twenty letters were referred to in the indictment without in any way specifying their character. The court said (p. 315):

> It may be conceded that the indictment would be more satisfactory if it gave more full information as to the contents or import of these letters, so that upon its face it would be apparent that they were calculated or designed to aid in carrying into execution the scheme to defraud. But still we think that as it stands it must be held to be sufficient. There was a partial identification of the letters by the time and place of mailing, and the charge was that defendant, "intending in and for executing such scheme and artifice to defraud and attempting so to do, placed and caused to be placed in the post-office," etc. This, it will be noticed, is substantially the language of the statute. If defendant had desired further specification and identification, he could have secured it by demanding a bill of particulars. (*Rosen* v. *United States*, 161 U. S., 29.)

It is insisted in the brief for plaintiff in error (p. 31) that the test of the indictment must be whether or not it so distinctly charges the exact offense that "on a plea of former acquittal or conviction the record may show with accuracy the exact offense to which the plea relates."

In the *Durland Case* (161 U. S., 314) the court said that "parol evidence is always admissible and sometimes

necessary to establish the defense of prior conviction or acquittal." (*Dunbar* v. *United States*, 156 U. S., 185, 191.)

If plaintiff in error had been acquitted upon this indictment, the objection here made, not having been taken before verdict, the plea of former acquittal would have availed him. (*United States* v. *Ball*, 163 U. S., 662, 669.)

In *Rosen* v. *United States* (p. 34), the court said:

> A defendant is informed of the nature and cause of the accusation against him if the indictment contains such description of the offense charged as will enable him to make his defense and to plead the judgment in bar of any further prosecution for the same crime. Does the indictment in this case meet these requirements? It describes the paper alleged to be obscene, lewd, and lascivious with such minuteness as to leave no possible doubt as to its identity. If the defendant did not have in his possession or could not procure a duplicate of such paper, he could have applied to the court for an order that he be furnished with a bill of particulars to the end that he might properly defend himself at the trial.

The demurrer and the motion to quash so far as applicable to the third and fifth counts are so general as to in no way indicate the point taken in this court.

The grounds of demurrer were as follows:

> For that the said indictment and each and every count thereof is ambiguous, unintelligible, and uncertain.
>
> For that the said indictment and each and every count thereof doth not state a public offense, and that neither nor any count thereof doth state a public offense. (Rec., p. 7.)

That of the motion to quash was as follows:

> And now comes the said Warren E. Price, said defendant, and moves to quash the said indictment and each and every count thereof, for that the said indictment does not state a public offense. (Rec., p. 7).

No bill of particulars was requested.

In *United States* v. *Bennett* (16 Blatchf., 338, 351), where the indictment described the book by name only, Mr. Justice Blatchford said:

> A copy of the book, with a designation of the obscene passages relied on, could have been obtained before the trial by asking for a bill of particulars. The defendant was not deprived of the right "to be informed of the nature and cause of the accusation." The weight of authority, as well as of reasoning, is in favor of the sufficiency of the present indictment.

In *Rosen* v. *United States* (161 U. S., 40), the court said:

> The doctrine to be deduced from the American cases is that the constitutional right of the defendant to be informed of the nature and cause of the accusation against him entitles him to insist, at the outset, by demurrer or by motion to quash, and, after verdict, by motion in arrest of judgment, that the indictment shall apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution for the same offense; that this right is not infringed by the omission from the indictment of indecent and obscene matter, alleged as not proper to be spread upon the records of the court, provided the crime charged, however general the language used, is yet so described as reasonably

to inform the accused of the nature of the charge sought to be established against him; and that, in such case, the accused may apply to the court before the trial is entered upon for a bill of particulars, showing what parts of the paper would be relied on by the prosecution as being obscene, lewd, and lascivious, which motion will be granted or refused, as the court, in the exercise of a sound legal discretion, may find necessary to the ends of justice.

II.

The second ground relied upon for reversal is that the Government inspector, Irwin, instigated the commission of the crime.

The proof showed that Irwin received and acted upon information that the defendant was engaged in using the mails in the dissemination of obscene literature (Rec., p. 10), and that the letters written by him were for the purpose of developing the fact whether or not the plaintiff in error was engaged in this unlawful business.

This is similar to the case of *Andrews* v. *United States* (162 U. S., 423).

It is too well settled to be now open to question that a party may be convicted of a crime committed against the United States, although the particular offense for which he is prosecuted was brought about by means of decoy letters. (*Grimm* v. *United States*, 156 U. S., 604, 610, and cas. cit.; *Goode* v. *United States*, 159 U. S., 663, 669, and cas. cit.; *Rosen* v. *United States*, 161 U. S., 29, 42; *Andrews* v. *United States*, 162 U. S., 420.)

J. M. Dickinson,
*Assistant Attorney-General.*